

**Model Federal Superfund Interest
Comfort/Status Letter**

[Insert Addressee]

RE: [Insert name or description of property/site]

Dear [Insert name of interested party]:

Thank you for contacting the U.S. Environmental Protection Agency (EPA or the Agency) on **[insert date]** about your plans concerning the property referenced above (the “Property”). In your inquiry, you described your intentions to **[insert general description of the “Development” (e.g., lease or buy the Property for commercial, residential, or recreational development)]** (the “Development”) and requested that we provide you with a Superfund comfort/status letter.

[OPTIONAL: Insert specific information based on the EPA regional practices. For example, include a summary of a telephone conversation with the interested party requesting a comfort letter.]

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund),¹ the Agency’s mission is to protect human health and the environment from the actual or potential risks posed by exposure to contaminated or potentially contaminated land and other media. A Superfund cleanup can help return lands to productive reuse. We are providing this letter consistent with the Agency’s 2019 Comfort/Status letter policy.² The purpose of this comfort/status letter includes providing you with information that may be relevant to the potential CERCLA liability concerns you have identified at the impacted Property and summarizing the relevant information available to the EPA about the Site as of the date of this letter. We hope this information will enable you to make informed decisions regarding the Property’s cleanup status and CERCLA’s liability protections as you move forward with making a decision about the Property.

[Federal facility-specific language for use when the property is a federal facility on the NPL rather than a private site insert]: “The U.S. **[insert agency/department]** [“owns” or “owned”] the facility, including the Property planned for redevelopment. Consistent with CERCLA § 120(h) and *Executive Order (E.O.) No. 12580 - Superfund Implementation*,³ at federally owned and operated facilities, the federal department or agency is generally responsible for any necessary cleanup activity.⁴ This federal Property is listed on the National Priorities List (NPL), and [“the EPA has” or “the EPA and the state of **[insert state]** have”] entered into a Federal Facility Agreement (FFA) with the [federal department/agency]. The FFA requires the federal owner/operator, with [“the EPA” or “the EPA and State”], oversight, to investigate and implement Superfund cleanups at the Site, including appropriate institutional controls that supplement the engineering component of a response action and help ensure protectiveness of public health and the environment.

With respect to federal transfers of property to non-federal parties, purchasers receive certain deed covenants from the United States pursuant to CERCLA §§ 120(h)(3) and (4), 42 U.S.C. §§ 9620(h)(3)

¹ 42 U.S.C. §§ 9601, *et seq.*

² See *2019 Policy on the Issuance of Superfund Comfort/Status Letters*.

³ Found at <https://www.archives.gov/federal-register/codification/executive-order/12580.html>.

⁴ Sections 2(d) and 2(e)(1) of E.O. No. 12580.

and (4).⁵ Section 120(h)(3)(C) of CERCLA sets forth the conditions under which either the EPA Administrator with the concurrence [“of the governor of the state where the facility is located” (for federally-owned property on the NPL) or “the governor” (for federally-owned property not on the NPL)] may defer the CERCLA § 120(h)(3)(A)(ii)(I) requirement of providing a covenant that all necessary remedial action has been taken prior to the date of transfer. In such cases, a transferee of property conveyed under Section 120(h)(3)(C) also receives assurances at the time of transfer that all necessary remedial action will be taken in the future.⁶ Once the United States has taken “all response action necessary to protect human health and the environment,” it must issue a warranty that satisfies that covenant requirement.⁷

The EPA recommends that you contact, if you have not done so already, the **[insert federal department/agency that owns the facility]** regarding the status of its CERCLA actions on the property and on the form of the CERCLA § 120(h) covenant that may be provided at transfer. Where the facility is on the NPL, the EPA [and the State] will help ensure that transfer by the federal agency is conducted consistent with the property transfer requirements of the FFA and CERCLA. In addition, the Agency issued its revised *Policy Towards Landowners and Transferees of Federal Facilities to Encourage Cleanup and Reuse of Federal Facilities on the National Priorities List*, (“2019 Transferee Policy”)⁸ which further describes the Agency’s policy on transferees of U.S. property, to encourage reuse and redevelopment at U.S. properties. **[End of Federal Facility language]**

Property Status

Information on sites that are, or potentially are, contaminated with hazardous substances and may warrant action under Superfund, including site-specific documents and fact sheets, is recorded in the EPA’s Superfund Enterprise Management System (SEMS), which may be accessed at <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>. SEMS includes a public access database that contains information about sites where there has been EPA regional office involvement under Superfund. **[Identify other sources of site-specific information, if available (e.g., EPA webpage, public repository).]** **[For federal facilities also identify where the owner/operator federal department/agency maintains their public site files.]**

The Property **[insert one of the following:]**

[a.] is defined as

[b.] is situated within

[c.] may be part of

⁵ These covenants make clear that, post-transfer, federal agencies shall conduct “any additional remedial action found to be necessary after the date of such transfer.” See 42 U.S.C § 9620(h)(3). Similarly, under CERCLA § 120(h)(4), federal agencies provide a covenant warranting that “any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States.” Note that the Section 120(h) covenant only applies to CERCLA hazardous substances, as defined in Section 101(14). However, Section 104(a) of CERCLA also provides broad response authority to federal agencies to address pollutants and contaminants where there is an imminent and substantial danger to public health or welfare, as well. Transferred properties may be subject to institutional controls which supplement the engineering component of a cleanup and help prevent exposure to hazardous substances, pollutants, and contaminants.

⁶ See 42 U.S.C. § 9620(h)(3)(C)(ii).

⁷ See 42 U.S.C. § 9620(h)(3)(C)(iii).

⁸ The EPA’s *Transmittal of Revised Policy Towards Landowners and Transferees of Federal Facilities to Encourage Cleanup and Reuse at Federal Facilities on the National Priorities List (NPL)* (May 17, 2019), <https://www.fedocenter.gov/admin/itmattachment.cfm?attachmentid=1200>.

[d.] is located near the [insert SEMS/NPL site name] ("Site"). This Site ["is" or "was"] located in SEMS, [insert one of the following:]

[a.] but is not on the National Priorities List (NPL).

[b.] and has been proposed to the National Priorities List (NPL).

[c.] and is on the National Priorities List (NPL).

[d.] subject to an ongoing response action [describe] subject to the Superfund Alternative Approach.

[e.] but was ["deleted" or "partially deleted"] from the National Priorities List (NPL).

For the reasons stated below, we are [insert action, e.g., investigating, examining, addressing] the Site under Superfund authority."

History and Status of the Site

As mentioned above, SEMS provides information for NPL sites (i.e., sites proposed to the NPL, currently on the final NPL, or deleted from the final NPL), sites subject to a federal removal action, and sites with a Superfund Alternative Approach agreement.⁹ The profile includes information such as the status of cleanup efforts and cleanup milestones that have been reached. For more information about the Site, please visit SEMS at <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>. **[If a federal facility, the federal department/agency's public site files.]**

[Insert the URL to the site-specific fact sheet and/or provide information that may be more current or in addition to the fact sheet, for example, the most recent Agency actions, status, institutional controls, etc.]

Reuse of the Property

Based on the information you provided, the EPA Region understands that you **[or insert name of interested party if requestor is a third party]** intend to **[insert brief description of the development]** at the Property. We also understand the development to involve **[insert brief description of proposed on-site activities]**. **[OPTIONAL, in whole or in part, and to be revised, as needed, if incompatibilities are currently known:** "Please note that, to ensure the remedy remains protective of human health and the environment, any development must be compatible with the EPA [or federal agency] cleanup actions and institutional controls (ICs) designed to protect the remedy and prevent unacceptable exposure to residual contamination. **[NOTE: For example, the EPA Regions could include language that an interested party should not conduct any activities or construct any structures that would interfere with the EPA's [or federal agency's] investigation or cleanup or be inconsistent with the underlying land use assumptions used to design and implement the cleanup.]** As of the date of this letter, we ("have not" identified any obvious incompatibility") or ("have identified an incompatibility") between the proposed use of the Property as you have described it to us and the EPA's selected cleanup option **[if incompatibilities are identified, please explain the EPA concerns and potential options, if possible. Also, insert any land restrictions, if known by the EPA Region]**. As your plans develop further, please continue to discuss the development with us [and/or the affected federal agency]. The EPA recommends that you consult with your own legal counsel and environmental professional to ensure that your proposed reuse will not affect EPA's cleanup response.""]

⁹ See *Transmittal of Updated Superfund Response and Settlement Approval for Sites Using the Superfund Alternative Approval (SAA Guidance)* (Sept. 28, 2019), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

CERCLA's Bona Fide Prospective Purchaser Liability Protection

[NOTE: Many inquiring parties are interested in information related to the bona fide prospective purchaser (BFPP) provision of CERCLA. If the EPA Region wishes to deviate from the language below, they must consult with Office of Site Remediation Enforcement (OSRE) or Federal Facilities Enforcement Office (FFEO). If the Region would like help drafting language, please reach out to the comfort/status letter contact in the Policy and Guidance Branch, OSRE or FFEO for letters pertaining to federal facilities.]

The EPA understands that you are interested in information regarding the bona fide prospective purchaser (BFPP) provision of CERCLA. Congress amended CERCLA in 2002 to exempt certain parties who buy contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person meeting the criteria of CERCLA §§ 101(40) and 107(r)(1), and who purchases the property after January 11, 2002, will not be liable as an owner or operator under CERCLA. **[For lessees, add: “The statutory definition of a BFPP also includes a party who acquires a leasehold interest in a property after January 11, 2002, where the leasehold is not designed to avoid liability and the interested party meets certain conditions and criteria.”]**

The Agency has issued guidance discussing some of the BFPP criteria. See *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”)* (“Common Elements Guidance”) (July 29, 2019 [(“copy enclosed”) **[or include the appropriate URL – <https://www.epa.gov/enforcement/common-elements-guidance>**]. Based upon your representation of your situation, the BFPP provision may apply. Note that a court, rather than the EPA, ultimately determines whether a landowner has met the criteria for BFPP status. Thus, the EPA recommends that you consult your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain BFPP status.

[OPTIONAL: INCLUDE THE FOLLOWING SECTION(S) DEPENDING ON WHETHER THE INFORMATION IS SUFFICIENT TO IDENTIFY SITE-SPECIFIC REASONABLE STEPS. THE REGION MAY ALSO INCLUDE LANGUAGE INDICATING THAT EPA, THE STATE, AND THE PRPS WILL REQUIRE CONTINUING ACCESS TO THE PROPERTY FOR THE PURPOSE OF [PERFORMING THE CLEANUP; GROUNDWATER MONITORING; FIVE-YEAR REVIEWS; AND MONITORING COMPLIANCE WITH INSTITUTIONAL CONTROLS:]

“Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance **[optional if URL not referenced above: “available at <https://www.epa.gov/enforcement/common-elements-guidance>”]**.

[REASONABLE STEPS]

[If there is enough information available to the EPA Region to determine reasonable steps, insert the following:] “You have asked what actions by [“the owner” or “the tenant”] of the Property may constitute reasonable steps. As noted above, the Agency has **[insert most recent/relevant action taken by the Agency]** at the Site and has identified several environmental concerns. Based on the information

we have evaluated to date, we believe that the following may be reasonable steps related to the hazardous substance contamination found at the Site.”

[Insert the list of reasonable steps or paragraphs outlining reasonable steps with respect to each environmental concern. Attachment B (Reasonable Steps Categories and Examples) to the Common Elements Guidance provides general guidance on the question of what actions may constitute reasonable steps. The Region may also include language indicating that EPA, the State, and PRPs will require continuing access to the property for [performing the cleanup; groundwater monitoring; five-year reviews; and monitoring compliance with institutional controls.

(Examples of reasonable steps include: maintaining the integrity of the fence surrounding the property; prohibiting public or private wells to be installed on the property for irrigation or consumption purposes; refraining from digging, disturbing soil, or constructing non-mobile structures or parking lots; calling the EPA’s regional Emergency Response Center hotline to report the discovery or release of any hazardous substances; contacting the PRP performing the work at the Site to discuss the proposed reuse; implementing and recording institutional controls in the deed pursuant to Section 101(40)(B)(vi) of CERCLA, and not performing any activities or constructing any structures that will or may interfere with the EPA’s investigation or cleanup or exacerbate contaminated conditions at the Site.)]

Any reasonable steps suggested by the EPA Region are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than the EPA, and because additional reasonable steps may later be necessary based on site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable step whether or not the EPA regional staff have identified any such steps.¹⁰ We recommend that you consult with your environmental professional and legal counsel to ensure that you take the reasonable steps necessary with respect to any hazardous substance contamination.

[If the EPA Region has insufficient information to identify reasonable steps, insert the following (language may be modified, as appropriate): “As noted above, [insert explanation as to why the EPA Region is lacking information (e.g., the remedial investigation has not yet been completed for the site)]. Although reasonable steps may be appropriate, we do not have enough information about the nature and extent of contamination at the Site to provide you [or insert name of the interested party if requestor is a third party] with what the EPA would consider to be appropriate reasonable steps at this time.”]

[END OF REASONABLE STEPS SECTION]

[NOTE: Some inquiring parties may ask whether a certain statutory exemption (e.g., innocent landowner) or a particular Agency guidance (e.g., affiliation) applies to their situation. Before the EPA Region inserts language discussing such a statutory exemption or guidance, the Region should consult with OSRE as this would be considered a significant deviation from this model.]

¹⁰ CERCLA § 101(40)(B)(iv) provides that “The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”

[OPTIONAL: Superfund Lien Pursuant to CERCLA § 107(l) (Note: If the EPA Region includes a discussion of the BFPP provision, consider including the information below regarding windfall liens.)

[Insert one of the following:]

[a.] No Superfund lien has arisen against the ["Site" or "Property"] pursuant to Section 107(l) of CERCLA. **Or**

[b.] A Superfund lien has arisen on the ["Site" or "Property"] pursuant to Section 107(l) of CERCLA.

[Then choose i, ii, iii, iv, or v.]

[i.] The EPA Region has not filed a notice of lien pursuant to CERCLA § 107(l)(3) on this ["Site" or "Property"] and is not in a position today to determine whether we intend to file such notice of lien with respect to the ["Site" or "Property"].

[ii.] The EPA Region has not filed a notice of lien pursuant to CERCLA § 107(l)(3) on this ["Site" or "Property"]. Pursuant to CERCLA § 107(l), the EPA will generally not file a notice of lien on property currently owned by a non-liaible party.

[iii.] The EPA Region has not filed a notice of lien pursuant to CERCLA § 107(l)(3) on this ["Site" or "Property"] because to date, we have recovered all the costs incurred at the Site from the potentially responsible parties (PRPs).

[iv.] The EPA Region has filed a notice of its Superfund lien on this ["Site" or "Property"] pursuant to CERCLA § 107(l). According to the Settlement Agreement between the Agency and **[insert name of the interested party]**, when the property is sold, we will release this lien upon compliance by the **[insert name of the interested party]** with the terms of the settlement agreement.

[v.] The EPA Region has filed a notice of its Superfund lien on this ["Site" or "Property"] pursuant to CERCLA § 107(l) and ["is" or "is not"] willing to seek a negotiated resolution leading to release of the lien.]

[OPTIONAL] Windfall Lien Pursuant to CERCLA § 107(r)

[NOTE: Information on windfall liens, consistent with Agency policy, is generally recommended if a discussion of BFPP is included above.]

Although Congress provided liability protection under CERCLA for BFPPs to encourage the purchase and reuse of contaminated properties, the property they acquire may be subject to a windfall lien pursuant to CERCLA § 107(r) if there are unrecovered response costs incurred by the United States and the response action increases the fair market value of the property. Unlike a CERCLA § 107(l) lien (aka "Superfund lien"), a windfall lien is not a lien for all the Agency's unrecovered response costs. The windfall lien is limited to the lesser of the Agency's unrecovered response costs or the increase in fair market value attributable to the EPA's cleanup. For more information, please refer to the Agency's *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA July 16, 2003* ("Windfall Lien Policy") ["(copy enclosed)" **or provide appropriate URL - <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>**].

[OPTIONAL, if applicable. Choose either a, b, c, or d.]

[a.] Based upon the information now available to the EPA Region, the Agency is not in a position today to determine whether the windfall lien policy may apply to this ["Site" or "Property"].

[b.] The EPA Region has not filed notice of a windfall lien under Section 107(r) of CERCLA on this [“Site” or “Property”]. In accordance with EPA policy, the EPA Region, generally, will not file notice of a windfall lien **[insert reason set forth in the windfall lien policy, for example, “where a bona fide prospective purchaser acquires the property at fair market value after cleanup”]**. **[OPTIONAL:** “A copy of the windfall lien policy [“is being” or “has been”] provided for your review.” or “The windfall lien policy can be found at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>.”]

[c.] Based upon the information now available to the EPA Region and consistent with the windfall lien policy, we believe that your situation falls under the **[insert reason set forth in the Windfall Lien Policy]** section of the guidance. [“A copy of the windfall lien policy [“is being” or “has been”] provided for your review.” or “The Windfall Lien Policy can be found at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>.”]

[d.] Based upon the information now available to the EPA Region, we believe that a windfall lien [“has arisen” or “will arise”] on the [“Site” or “Property”] **[OPTIONAL:** “in the amount of \$ ____”] If you wish to settle the windfall lien, we are willing to seek a negotiated resolution leading to release of the lien.

State Actions

We can only provide you with information about federal Superfund actions at the Site, federal law and regulations, and EPA guidance. For information about potential state actions and liability issues, please contact **[insert name of state’s environmental program or name of specific state contact and contact information]**. **[NOTE: If there is a state contact who handles technical issues, also insert their contact information.]**

Conclusion

The EPA Region remains dedicated to facilitating the cleanup and reuse of contaminated properties and hopes the information contained in this letter is useful to you. Please note that the letter does not offer conclusive statements about Site conditions or liability. You may find it helpful to consult your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the impacted Property. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements. If you have any additional questions or wish to discuss this information further, please feel free to contact **[insert EPA contact information]**.

Sincerely,

[Insert regional contact name]

[Insert regional contact title]

[Enclosures (#)]

cc: **[Insert EPA OSRE or FFEO comfort/status letter contact]**

[Insert EPA OLEM contact]

[Insert state contact(s), if applicable]